89-1129

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

GEORGE HERTZKE and SHARON HERTZKE, Individually and as parents of SHAWN HERTZKE, a minor,

Petitioners

versus

JOHN REILEY, JOHN DOUGHERTY, DON JERRY MILLER, ROBERT LUMSDEN, JOHN MORGAN, RALPH MARINETTI, and UNITED STATES DRUG ENFORCEMENT AGENCY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST PETITIONERS/PLAINTIFFS BY IMPROPERLY APPLYING DESHANEY V. WINNEBAGO COUNTY DEPT. OF SOCIAL SERVICES, TO A CIVIL RIGHTS CLAIM WHERE THE EXPLICIT CONTENTION OF THE PETITIONERS IS THAT THE GOVERNMENT DEFENDANTS CREATED THE ATMOSPHERE OF PRIVATE VIOLENCE AGAINST PLAINTIFF THEREBY GIVING THEM THE DRACONIAN CHOICE OF LIVE FREE AND DIE, OR LIVE AS A PRISONER OF THE FEDERAL WITNESS PROTECTION PROGRAM IN VIOLATION OF PETITIONERS/PLAINTIFFS' CONSTITUTIONAL RIGHTS?

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The Third Circuit

OPINIONS BELOW

The judgment and Order of the United States Court of Appeals, Third Circuit rendered November 2, 1989 is unpublished and appears at Appendix Page 27 .

The Memorandum and Order of the United States District Court, Eastern District Of Pennsylvania rendered May 8, 1989 is unpublished and appears at Appendix Page 29 .

JURISDICTION

The final judgment of the United States Court of Appeals for the Third Circuit is dated November 2, 1989, and this Petition for a Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of the Court.

FEDERAL PROVISIONS INVOLVED

The Federal provisions involved are 42 U.S.C. Section 1983, 42 U.S.C. Section 1985(c) and the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE

a) Procedural History

The Plaintiffs filed a Complaint against the Defendants on behalf of themselves and their minor son, Shawn, date of birth June 19, 1971, alleging a violation of Plaintiffs' constitutional right to life (bodily security) and their right to liberty under the Fifth and Fourteenth Amendments to the United States Constitution. All Defendants duly filed answers raising the issue of statute of limitations. Thereafter, the deposition of Plaintiff, Sharon Hertzke, was duly taken on May 3,

1988 under the auspices of the protection of the United States Marshalls in Lexington, Kentucky.

In response thereto, the Defendant, Ralph Marinetti, duly filed a motion of summary judgment alleging dismissal on one ground only, namely, the two year statute of limitations. Thereafter, the Federal Defendants (Riley, Dougherty, Miller, Lumsden, Morgan and DEA) filed a motion to dismiss alleging two grounds, the two year statute of limitations and immunity.

Thereafter, Federal Defendants filed an Amended Motion seeking dismissal based upon Plaintiffs supposed failure to allege a violation of constitution rights. Plaintiffs timely responded to Defendants' Motion by inter alia clearly reiterating and providing evidence of the allegations of Plaintiffs Complaint. Specifically,

Plaintiffs' claimed and produced evidence that Defendants violated Plaintiffs' constitutional rights to life and liberty by forcing Plaintiffs, who were never involved in criminal activity, to chose between entering the Federal Witness Protection Program (FWPP) or to live "free" and as the focus of violence by criminals Defendants used Plaintiffs to pursue.

Considering evidence outside pleadings the District Court properly treated Federal Defendant's motion to dismiss as a motion for summary judgment. However, on May 8, 1898, the district court relied upon a recent United States Supreme Court case (DeShaney v. Winnebago County Department of Social Service, 109 S.Ct 998 (1989)) which was not applicable to the facts of this case in granting Defendant's Motion. The district court relied upon a case which

deals with legal and factual circumstances unrelated to this case. On November 3, 1989, the Third Circuit Court of Appeals affirmed the District Court. Petitioners now respectfully petition this Honorable Court for a Writ of Certiorari.

b) Statement of Facts

The facts concerning the involvement of Plaintiff, Sharon Hertzke, in a criminal investigation undertaken by the Pennsylvania State Police Strike Force and the DEA are explained, in detail, in the official reports of the Pennsylvania State Police Investigative Reports.

In summary form, the deposition and documentary evidence indicate that, at all relevant times, Plaintiff, Sharon Hertzke was a law-abiding citizen with no criminal record, and who never engaged in any crimi-

nal enterprise. In 1983, the Plaintiff, Sharon Hertzke, by chance received information concerning criminal drug activity, and she duly reported the information to local police officers. After reporting the information to local police officers, Plaintiff, Sharon Hertzke, was contacted at various times by Defendants, Reily, Dougherty, Miller, Lumsden, Morgan and Marinetti in their official capacities as Federal and State Law Enforcement Officers. Rather than using standard police investigation techniques and acting upon the information given to them by Plaintiff, Sharon Hertzke, the Defendants conspired with each other to induce the Plaintiff despite the obvious risk to her life to act as an undercover operative for the law enforcement official using her in an evidence-gathering function.

The Defendants, Reily, Dougherty, Miller, Lumsen, Morgan, and Martinetti were aware that Plaintiff, Sharon Hertzke, was an "innocent bystander", that she was not involved in any way in any criminal enterprise, that it was in violation of federal and state law enforcement practice to induce an innocent bystander to become a police operative, that the function of police operatives involved in this particular investigation was a highly dangerous undertaking, and that the criminals with whom Defendants wanted Plaintiff, Sharon Hertzke, to associate with were criminals of vicious and violent propensities who would retaliate against Plaintiff, Sharon Hertzke, and her family even after conviction and imprisonment.

Despite this actual knowledge, the Defendants, Reiley, Dougherty, Miller,

Lumsden, Morgan, and Marinetti illegally induced Plaintiff, Sharon Hertzke, to act as a police operative in violation of her constitutional rights to life and bodily security by making false representation to her concerning lifelong compensation for her services. As a result of these fraudulent representations by the Defendants, Sharon Hertzke, in fact functioned for a large part of 1983, as an undercover police operative, and she was instrumental in receiving valuable evidence on several notorious criminals, which lead to several arrests and convictions.

Prior to the actual trial of one of the notorious criminals, an unsuccessful effort was made to kill Plaintiff, Sharon Hertzke, by a person or persons unknown. As a result of transferring an "innocent bystander" into an undercover operative,

and as a result of the jeopardy to Plaintiffs' constitutional right to life and bodily security, Defendants then arranged with the United States Department of Justice to place Plaintiffs inside the structures of the Federal Witness Protection Program with all concomitant limitations on Plaintiff's constitutional right to liberty.

As a result of the placement in the Federal Witness Protection Program, Plaintiffs have been deprived of their constitutional right to liberty guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution in the following respects:

1. Plaintiffs cannot use their identity;

2. Plaintiffs cannot visit friends and relatives;

3. Plaintiffs must abide by the living and travel restrictions imposed upon them by the United States Department of Justice.

The result of the myriad restrictions impaired upon Plaintiff is that Plaintiffs are prisoners of the United States Department of Justice in a form of "house arrest", and this imprisonment was necessitated by the Defendants jeopardizing Plaintiffs' constitutional right to life and bodily security.

The Federal Defendants attempt to characterize the Plaintiff, Sharon Hertzke, as a "confidential informant" who can be used--and abused--in accordance with the individual discretion of DEA agents. There is nothing in the history of the relationship between Hertzke and the Defendants which in any way suggests that she was a

"confidential informant" as that term is classically used. Additionally, there was nothing in Sharon Hertzke's situation which enabled her to penetrate a major drug ring. In fact, the cover story--the chemical supplies--the contact with the drug dealers--were all arranged by the Defendants. Plaintiff, Sharon Hertzke, was a classical "innocent bystander" caught in an evil web created by the Defendants for the objective of the Defendants, namely, to convict major drug dealers. In order to do this, the Defendants trampled upon the constitutional rights of Plaintiffs.

The Federal Defendants claimed that the Plaintiffs have not identified any constitutional rights, and that this claim is for an unidentified "lump-sum" of money which she knew by June 29, 1983 that she was not going to receive.

At the risk of belaboring the obvious, neither the State Defendant nor the Federal Defendants have properly characterized Plaintiffs' claim. In Plaintiffs' Complaint, Plaintiffs identified the two most basic of constitutional rights: life/bodily security and liberty. Paragraphs 10, 16, 19, 20, 21, and 22. As stated at Paragraph 20 of the Complaint:

> "20. As a result of the Defendants' action, Plaintiffs were given the Draconian choice: live free and die at the hands of criminals, or live as prisoners of the Federal Witness Protective Program."

Upon these facts the district court granted Defendants' summary judgment motions on the ground that "plaintiffs have failed to allege a constitutional violation" District Court Order page 2, Appendix Page 30. The Third Circuit Court of Appeals upheld summary judgment. Plain-

tiffs' Petition is now before this Honorable Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision sanctioning a lower court order which has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS PROPERLY APPLIED DESHANEY V. WINNEBAGO COUNTY DEPT. OF SOCIAL SERVICES, SUPRA, TO A CIVIL RIGHTS CLAIM WHERE THE EXPLICIT CONTENTION

OF THE PLAINTIFFS IS THAT THE GOVERNMENT DEFENDANTS CREATED THE ATMOSPHERE OF PRIVATE VIOLENCE AGAINST PLAINTIFF THEREBY GIVING THEM THE DRACONIAN CHOICE OF LIVE FREE AND DIE, OR LIVE AS A PRISONER OF THE FEDERAL WITNESS PROTECTION PROGRAM?

1. Petitioners clearly alleged that Defendants/Appellees violated their constitutional rights to life/bodily security and to liberty.

The district court erroneously found that Plaintiffs failed to allege the violation of constitutional rights.

At the risk of belaboring the obvious, neither the State Defendant nor the Federal Defendants properly characterized Plaintiffs' claim. In Plaintiff's Complaint, Plaintiffs identified the two most basic of constitutional rights: life/bodily security and liberty. Paragraphs 10, 16, 19, 20,

21, and 22. As stated at Paragraph 20 of the Complaint:

> "20. As a result of the Defendants' action, Plaintiffs were given the Draconian choice: live free and die at the hands of criminals, or live as prisoners of the Federal Witness Protection Program."

Plaintiffs' maintain, as they have from the beginning, that Defendants violated their constitutional rights by using Plaintiffs for dangerous undercover work, jeopardizing Plaintiffs' lives thus forcing Plaintiffs to enter the FWPP to survive further attempts to kill them. Plaintiffs thus alleged that Defendants violated their constitutional rights to life/bodily security and to liberty.

At very least, genuine issues of material fact exist surrounding Plaintiffs' allegations which preclude summary judgment.

2. Federal Defendants are liable to Petitioners/Plaintiffs for violating Plaintiffs' right to life/bodily security and to liberty.

In Bivens v. Six Unknown Named Agents of the F.B.I., 403 U.S. 388, 91 S.Ct 1999 (1971), the Supreme Court of the United States held that federal officials can be liable for violation of an individual's constitutional rights directly under the Constitution. See, also, Davis v. Passman, 422 U.S. 228, 99 S.Ct 2264, 60LE2d 846 (1979); Berlin Democratic Club vs. Rumsfield, 410 F Supp 144 (D.D.C. 1976); Wounded Knee Legal Defense Com vs. F.B.I., 507 F2d 1281 (8th Cir, 1974); Carlson vs. Green, 446 U.S. 14 (1980); Angola v. Civiletti, 666 F2d 1, 3-4 (2nd Cir, 1981); Dellumo v. Powell, 566 F2d 167, 194-196 (D.C. Cir, 1977); White v. Boyle, 538 F2d

1077, 1079 (4th Cir, 1976); Paton v. La Prade, 524 F2d 862, 869-872 (3rd Cir, 1975); Sonntag v. Dooley, 650 F2d 904 (7th Cir, 1981); Miller v. Stanmore 636 F2d 986 (5th Cir, 1981); Love v. Budai, 665 F2d 1060 (DC Cir, 1980); Marshall v. Kleppe, 637 F2d 1217 (9th Cir, 1980); Micklus v. Carlson, 632 F2d 227 (3rd Cir, 1980); Loe v. Armisted, 582 F2d 1291 (4th Cir, 1978).

In the case at bar, Plaintiffs have specifically stated a cause of action directly under the United States Constitution for violation of their Fifth Amendment rights to life/bodily security and liberty.

a. The constitutional right to life/bodily security is protected by the Fifth and Fourteenth Amendments to the United States Constitution. The Federal Defendants' claim that Plaintiffs have identified no constitutional rights on its

Complaint. To the contrary, the Plaintiffs specifically pleaded the constitutional right to life/bodily security and liberty. The constitutional right to life/bodily security is protected by the Due Process Clause of the Fifth and Fourteenth Amendments. See, Martinez vs. California, 444 U.S. 277, (1980.

b. The constitutional right to liberty is protected by the Fifth and Fourteenth Amendments to the United States Constitution. Similarly, the constitutional right to liberty is protected by the Due Process Clause of the Fifth and Fourteenth Amendments. See, Coppage v. Kausas, 236 U.S. 1, 35 S.Ct 240; Moyer vs. Nebraska, 262 U.S. 390, 43 S.Ct 625; Wolff vs. McDonnell, 418 U.S. 539, 94 S.Ct 2963; Hicks vs. Feeney, 770 F.2d 375.

c. Defendants in this case violated

Plaintiffs constitutional right thus giving rise to a Bivens-type cause of action.

This is not a case where a criminal opted to give information to the government in exchange for leniency and entered the F.W.P.P. Plaintiffs here were not involved in any wrongdoing.

This is not a case where a person in the street coincidentally witnessed a crime agreed to testify about the crime, was placed in the F.W.P.P., and now complains on restrains on his liberty due to entry in the F.W.P.P.

Rather, this is a case in which the federal and state government set up Plaintiff, Sharon Hertzke, to act as an undercover operative and used her in an evidence gathering function. For example, Defendants provided Plaintiff with a cover story and chemical supplies and directed her to

sell the chemicals to drug dealers. Defendants used Plaintiff for several months to penetrate a major drug ring. Plaintiff's work for Defendants led to the arrest and conviction of major drug dealers, as evidenced by the Police Investigative Reports.

Defendants unethical and illegal use of Plaintiff as an undercover agent jeopardized Plaintiff's life. Before trial of one of the major drug dealers, someone attempted to kill, and violently beat up Plaintiff. Then faced with obvious abuse of Plaintiff's right to life/bodily security, Defendants placed Plaintiffs in the F.W.P.P. with all its aforesaid restraints on Plaintiff's liberty. Plaintiffs' cause of action, therefore, is the violation of their constitutional rights by Defendants consuming her into the F.W.P.P.

At very least, genuine issues of material fact exist surrounding Plaintiffs' allegations and evidence. Thus, the district court erred in granting summary judgment. The Court of Appeals erred in affirming summary judgment.

3. The district court erred as a matter of law in applying DeShaney, supra. to the case at bar.

The district court relied upon DeShaney in granting Defendants' Motion even though DeShaney dealt with a separate theory of constitutional violation.

In DeShaney, the mother of a child who had been beaten by the father brought a civil rights action against social workers and local officials. The Defendants in DeShaney knew that the father was abusing the child but failed to remove the child from the father's custody. As the district

court stated DeShaney held that a government's failure to protect an individual against private violence does not constitute a due process violation. This is a correct statement of law which does not pertain to the case at bar.

a. The legal issue in DeShaney was whether or not the government Defendant had a duty to provide adequate protection to the child

Generally the government has no affirmative duty to care for the safety and general well being of an individual unless the person is within the "custody" of the government. DeShaney, 109 S.Ct at 1005 (citations omitted). After reviewing the legal precedents and reasons the Supreme Court found that the child was not in the "custody" of the government at the time his father beat him. Accordingly, the Supreme

Court concluded that the State had no constitutional duty to protect the child. DeShaney, supra, 109 S.Ct at 1006.

b. Plaintiffs' claim is NOT that Defendants failed to prove adequate protection from private violence or from anything else.

IF Plaintiffs' claimed that Defendants' took Plaintiffs into "custody" through the F.W.P.P. and then failed to provide Plaintiffs' with adequate protection, then the analysis from DeShaney would apply. For example such a case could arise if Plaintiffs were injured when Defendants failed to provide adequate protection to Plaintiffs from a criminal against whom Plaintiff testified at trial. However, Plaintiffs claim is distinct. Plaintiffs do NOT seek damages for injuries caused by private violence. Instead, Plaintiffs seek

damages for violation of their constitutional rights by Defendants action in using Plaintiffs' to perform dangerous undercover activity as set forth herein.

c. The legal analysis in DeShaney is inapplicable to the case at bar.

After reviewing DeShaney the district court stated that Plaintiffs' were not in the custody of the Federal Government against their will, that no special relationship existed between Plaintiffs and the Federal Government giving rise to a constitutional duty to protect them and thus "[found] that Plaintiffs' due process liberty rights have not been violated." Order of May 8, 1989 at page 8, Appendix page .

The due process liberty right Plaintiffs claim Defendants violated is not the right to adequate protection. Rather,

Plaintiffs contend that Defendants forced Plaintiffs into a position where Plaintiffs' were forced to chose between their right to life and/or bodily security (because of the real threat that a person they helped convict would injure them) and their right to liberty (which would be and is restricted by their participation in the F.W.P.P.). The district court erred in relying upon DeShaney and granting Defendants' Motions. The Court of Appeals erred in affirming. Hence, Petitioners respectfully petition this Honorable Court for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals affirming the trial court's granting summary judgment in favor of Defendants and against the Plaintiffs ought to be reversed.

ORLOSKI & HINGA

Richard J. Orloski,
Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GEORGE HERTZKE and SHARON HERTZKE, Individually and as parents of SHAWN HERTZKE, a minor

v.

JOHN REILEY, JOHN DOUGHERTY, DON JERRY MILLER, ROBERT LUMSDEN, JOHN MORGAN, RALPH MARINETTI and UNITED STATES DRUG ENFORCEMENT AGENCY

(Civil Action No. 88-0939 - E.D. PA)
District Judge: Honorable Jan E. Dubois

Submitted Under Third Circuit Rule 12(6)
October 19, 1989

BEFORE: BECKER, COWEN and SEITZ,
Circuit Judges.

JUDGMENT ORDER

This court agrees with the district court that the plaintiffs were not deprived of their liberty interest under the Constitution because they elected to enter the Federal Witness Protection Program in fear

of danger to themselves. Although the danger to plaintiffs as a consequence of the disclosure that the wife was working with the authorities presented plaintiffs with an extremely unpleasant choice, viz., enter the Program or live unprotected, the choice was plaintiffs' and was not imposed by the government. Furthermore, the wife voluntarily agreed to become an undercover agent. Thus, no governmental coercion was involved. Summary judgment was therefore properly granted in favor of defendants. See, DeShaney v. Winnebago County Dept. of Social Services, 109 S.Ct. 998 (1989).

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

_____

Circuit Judge

ATTEST:

_____

Sally Mrvos, Clerk

DATED: NOV. 2, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE HERTZKE, et al.	:	CIVIL ACTION
	:	
vs.	:	NO. 88-0939
	:	
JOHN REILLY, et al.	:	MAY 8, 1989

MEMORANDUM AND ORDER

DUBOIS, J. May 8, 1989

Presently before me is the Motion of the defendants, John Reilly, John Doherty, Donn Jerre Miller, Robert Lumsden, John Morgan and the United States Drug Enforcement Administration (hereinafter the "Federal Defendants"), to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted and the Motion of the defendant, Ralph Marinetti (hereinafter sometimes referred to as the "State Defendant"), for Summary Judgment

pursuant to Fed. R. Civ. P. 56. Because the Court has been presented with evidence outside the pleadings which I have not excluded, the Federal Defendants' Motion to Dismiss shall be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 56. See Carter v. Stanton, 405 U.S. 669 (1972). This Court has jurisdiction pursuant to 28 U.S.C. Sections 1343 and 1346.

In this suit plaintiffs allege that the actions of the defendants in obtaining the cooperation of plaintiff, Sharon Hertzke, in an investigation of illegal drug related activities and the placement of the three plaintiffs in the Federal Witness Protection Program ("FWPP") resulted in a deprivation of plaintiff's constitutional right to liberty under the

Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The defendants' Motions will be granted and judgment will be entered in favor of the defendants and against the plaintiffs on the ground that plaintiffs have failed to allege a constitutional violation.

For the purposes of these Motions, "[t]he evidence of the non-movant[s] [is] to be believed, and all justifiable inferences are to be drawn in [their] favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, (1986). With that directive in mind, the facts of this case may be summarized as follows:

In late 1982, plaintiff Sharon Hertzke contacted the Whitehall Township Police with information concerning illegal drug

related activities. Ms. Hertzke learned of this information through her sister, who, at various times, resided with Ms. Hertzke, her husband and her son. There is no evidence that Ms. Hertzke had any criminal record or that she had engaged in any criminal enterprise.

The Whitehall Township police referred the case to the Pennsylvania State Police Strike Force. In January of 1983, Trooper James McAndrew of the Strike Force interviewed Ms. Hertzke. In early February of 1983, Ms. Hertzke met with Trooper McAndrew's superior, defendant Corporal Ralph Marinetti. Corporal Marinetti asked Ms. Hertzke to become a confidential in-

formant and to participate in the investigation by making a "chemical drop" - delivering a chemical used to manufacture an illegal drug. On February 4, 1983, Ms. Hertzke signed papers consenting to a body wiring. While Ms. Hertzke was in contact with the Strike Force, various officers spoke to her about meeting with people from the United States Drug Enforcement Agency ("DEA") and told her that people from the DEA would "take care of her".

A few days prior to February 17, 1983, Ms. Hertzke met with Pennsylvania State Police Strike Force Officers McAndrew and Marchetti to discuss the FWPP. On February 17, 1983, Ms. Hertzke and her husband, plaintiff George Hertzke, met with Defendants, John Doherty, an Assistant U.S.

Attorney, and DEA Agents Donn Jerre Miller, Robert Lumsden, and John Morgan, and Officer Marinetti. Officers McAndrew and Marchetti were also in attendance. At this meeting Agents Lumsden and Morgan explained the FWPP to plaintiffs Sharon and George Hertzke. Agents Lumsden and Morgan also promised the plaintiffs that rather than entering the FWPP, the plaintiffs could be relocated anywhere they wanted and given a lump sum of money. The amount of money was never disclosed to the plaintiffs.

Shortly before the arrests of the subjects of the investigation were made on April 18, 1983, Agent Lumsden informed Ms. Hertzke that no money was left for the lump sum option. In May of 1983, Ms. Hertzke again discussed the FWPP, and she and her

family agreed to participate in the program. Thereafter, the plaintiffs were placed in a safe house in the Poconos for two months until they entered the program on June 29, 1983. The plaintiffs have remained in the FWPP since that time.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part[ies] [are] entitled to judgment as a matter of law." Summary judgment is mandatory when "a party...fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Plaintiffs contend that the broken promise by the DEA agents-to give the Hertzkes a lump sum of money and relocate then anywhere-has placed their lives in danger and has forced them to participate in the FWPP which has deprived them of their constitutional right to liberty as stated in the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs seek to impose liability for deprivation of their constitutional rights and conspiracy to deprive them of their constitutional rights against the State Defendant under 42 U.S.C. Sections 1983 and 1985(3) and against the Federal Defendants under Bivens v. Six Unknown Named Agents of the Federal

Bureau of Narcotics, 403 U.S. 388 (1971).

To state a cause of action under 42 U.S.C. Section 18983, the plaintiffs must allege that the defendants have violated some right "secured by the Constitution and laws." See Baker v. McCollan, 443 U.S. 137 (1979). Similarly, the plaintiffs must allege the violation of a constitutional right to sustain a Bivens action. Rodriguez v. Ritchey, 556 F.2d 1185; McNally v. Pulitzer Pub. Co., 532 F.2d 69, 76 (8th Cir.), cert. denied, 429 U.S. 855 (1976). Thus, the threshold issue is whether the restraints imposed by the FWPP encroach on the liberty rights secured by the constitution. I find that they do not.

The FWPP was established as part of the Organized Crime Control Act of 1970 and is codified at 18 U.S.C. Section 3521. The

purposes of the program are "to guarantee the safety of government witnesses who agree to testify against alleged participants in organized criminal activity and thereby create an incentive for persons involved in such activities to become informants". Franz v. United States, 707 F.2d 582, 586 (D.C. Cir 1983). Generally, persons inducted into the program are relocated and provided with new identities, the documents to support these new identities, as well as housing, employment, medical services and other social services. See id..

It is uncontested that participation in the program is voluntary. Although participants in the program must abide by certain restrictive rules, once a prospective participant is accepted, the

decision to enter the program is entirely left to that person's discretion. Moreover, once an individual is inducted into the program, they are free to leave at any time.

The plaintiffs acknowledge their freedom to leave the program, but they contend that this freedom is illusory due to the possible danger posed by the subjects of the investigation in which Ms. Hertzke participated. In paragraph 20 of the Complaint, plaintiffs characterize their options as "Draconian"-"live free and die at the hands of criminals, or live as prisoners of the Federal Witness Protection Program"-and contend that, by placing them in that situation, defendants violated their due process liberty interest. The Supreme Court recently rejected a similar

analysis of the Due Process liberty interest in DeShaney v. Winnebago County Dept of Social Services, 109 S.Ct. 998 (1989).

The Deshaney case arose when a four-year-old boy suffered brain damage after being beaten by his father. The mother, who did not have custody of the child, brought suit against the Winnebago County Department of Social Services under 42 U.S.C. Section 1983 for depriving the boy of his liberty "by failing to intervene to protect him against a risk of violence at this father's hands of which they knew or should have known." Id., 109 S.Ct. at 1002.

The Supreme Court, in an opinion by Chief Justice Rehnquist, held that a gov-

ernment's failure to protect an individual against private violence does not constitute a due process violation. Id., 109 S.Ct. at 1004. The Constitution imposes an affirmative duty upon government to care for the safety and general well-being of an individual only when that government takes the individual into custody and holds him/her there against his/her will. Id., 109 S.Ct. at 1005. The critical analysis centers on whether the government's actions constitute taking "custody" of the individual against his/her will, not whether the government has contributed to the danger the individual faces from a private individual.

Due process liberty interests are raised when an individual has been involuntarily committed, see Youngberg v. Romeo,

457 U.S. 307 (1982), or when an individual has been incarcerated, see Estelle v. Gamble, 429 U.S. 97 (1976). So long as an individual is free to leave the care and control of the government, the government does not have a constitutional obligation to provide for that individual's safety and general well-being. [1] The Supreme Court

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1.The government may have a constitutional obligation to provide for the safety and well-being of a voluntarily confined individual who is incapable of giving informed consent. See Clark v. Cohen, 794 F.2d 79, 92 n.7 (3d Cir.) (Becker, J., concurring), cert. denied, 479 U.S. 962 (1986); Woods v. Ronald Bruce Nipon Ass'n Inc., No. 86-4548 (E.D. Pa. Feb. 25, 1987).

Plaintiffs Sharon and George Hertzke do not allege that they are incapable of making an informed decision regarding their continued participation in the program. Although Plaintiff Shawn Hertzke may not be able to give informed consent because he is a minor, his participation in the FWPP is compelled solely by his parents and not by an governmental actor or entity; therefore, his inability to give informed consent does not invoke any Due Process liberty interest unless his participation in the FWPP is

has stated the rationale for this principle as follows:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

DeShaney, 109 S.Ct. at 1005-06 (citations omitted).

By participating in the FWPP, the plaintiffs are not in the custody of the Federal Government against their will. To

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...Continued...

against the will of his parents. See Parham v. J.R., 442 U.S. 584 (1979) (Stewart, J. concurring).

the contrary, plaintiffs are free to leave the control of the Federal Government at any time. Moreover, the fact that some of the defendants allegedly were aware of the danger confronting plaintiffs and broke a promise to protect them does not establish a special relationship giving rise to a constitutional duty to protect them. Accordingly, I find that plaintiffs' due process liberty rights have not been violated.

Although the plaintiffs fail to allege any constitutional deprivations, they may be able to state a cause of action under state law in tort or for breach of contract. What the court is saying today is that any such torts or breaches of contract by government actors are not

constitutional violations. See DeShaney, 109 S.Ct. at 1007; Daniels v. Williams, 474 U.S. 327, 335 (1986).

Because plaintiffs have failed to allege a constitutional violation, I find the Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. Sections 1983 and 1985(3) and Bivens. Accordingly, I do not reach the issues of the statute of limitations and qualified immunity.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE HERTZKE, et al.	:	CIVIL ACTION
	:	
	:	NO. 88-0939
JOHN REILLY, et al.	:	

ORDER

AND NOW, to wit, this 8th day of May,

1989, upon consideration of the Motion of the defendants, John Riley, John Doherty, Donn Jerre Miller, Robert Lumsden, John Morgan and the United States Drug Enforcement Administration, to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), such Motion being considered as a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56, and the Motion of the defendant, Ralph Marinetti, for Summary Judgment pursuant to Fed. R. Civ. P. 56, and the response of the plaintiffs, George Hertzke, Sharon Hertzke and Shawn Hertzke, **IT IS ORDERED** that the Motions of the Defendants are GRANTED and judgment is entered in favor of the defendants, John Riley, John Doherty, Donn Jerre Miller, Robert Lumsden, John Morgan, the United

States Drug Enforcement Administration and Ralph Marinetti, and against the plaintiffs, George Hertzke, Sharon Hertzke and Shawn Hertzke.

BY THE COURT:

JAN E. DUBOIS, J.

NO. 89 - 1129

FILED
FEB 15 1990
JOSEPH F. SPANIOL, CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GEORGE HERTZKE, et al.,
Petitioners

v.

JOHN RILEY, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT MARINETTI'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly applied DeShaney v. Winnebago County Department of Social Services, No. 87-154 (U.S. Feb. 22, 1989), to the facts of this case?

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Respondent Ralph Marinetti respectfully requests that the Court deny the petition for a writ of certiorari which seeks review of the Court of Appeals' affirmance of the District Court's dismissal of this case.

COUNTERSTATEMENT OF THE CASE

The petitioners, Sharon and George Hertzke and their son Shawn, are participants in the Federal Witness Protection Program (hereinafter "FWPP" or "the program"). They seek review of the Court of Appeals' affirmance of the District Court's dismissal of their civil rights action which asserted a cause of action based on their participation in the FWPP.

1. Petitioners filed their action in the United States District Court for the Eastern District of Pennsylvania pursuant to 42 U.S.C. §§ 1983 and 1985(3) against the United States Drug Enforcement Agency and various federal and state law enforcement officers and

officials including Ralph Marinetti, a Corporal with the Pennsylvania State Police Strike Force.

2. In 1983, Sharon Hertzke voluntarily assisted police in the course of a drug investigation. (Dep., pp. 35-50).[1] As part of the investigation, Ms. Hertzke signed memoranda of consent to be body wired. (Dep., pp. 55-69; 206-208). Subsequently, the Hertzkes agreed to participate in the Federal Witness Protection Program and signed a memorandum of understanding to this

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[1]"Dep." refers to Ms. Hertzke's deposition which was attached to Respondent Marinetti's Motion for Summary Judgment as Exhibit III.

effect. (C.A. App., pp. 129a-137a).[2]

Contrary to petitioners' statement of facts, there are no facts of record to support the contention that it is a "violation of federal and state law enforcement practice" to use an ordinary civilian as a confidential informant. (Petition, p. 7). Likewise, there are no facts of record to support the assertion that respondents "conspired with each other to induce" Sharon Hertzke to assist them in their investigation. (Petition, p. 6). Contrary to petitioners' claim, respondent Marinetti did not make any

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[2]"C.A. App." refers to the Appendix which petitioners filed in the Court of Appeals.

"representation to [Ms. Hertzke] concerning lifelong compensation for her services." (Petition, p. 8). Respondent Marinetti never participated in arranging for the Hertzkes' placement in the FWPP. (Petition, p. 9). The Hertzkes are voluntary participants in the FWPP and can leave the program at any time. (C.A. App., pp. 130a-148a).

In their lawsuit, petitioners claim that the methods which respondents used to gain Sharon Hertzke's cooperation in the investigation were coercive and that the placement of them in the witness protection program resulted in a violation of their constitutional right to liberty under the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

3. Respondents moved for summary judgment on the grounds that petitioners failed to state a claim for deprivation of any right guaranteed by the United States Constitution and that the statute of limitations and various forms of immunity barred petitioners' claims. The District Court granted respondents' motions and dismissed petitioners' complaint finding that petitioners had failed to allege a constitutional violation. Relying on this Court's analysis in DeShaney v. Winnebago County Department of Social Services, No. 87-154 (U.S. Feb. 22, 1989), the District Court found that the restraints imposed on petitioners by the FWPP do not encroach on any liberty rights

secured by the constitution. The Court of Appeals summarily affirmed.

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT PRESENT ANY SPECIAL OR IMPORTANT ISSUE TO JUSTIFY REVIEW BY THE COURT

1. Petitioners have offered no reasons to justify the Court's exercise of discretionary review. They have pointed to no important and unsettled issue for resolution by the Court, nor do they argue that a decision by the Court is necessary to resolve a conflict among the circuits. Rather, they present a peculiar set of facts[3]

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[3]Many of petitioners' allegations, moreover, are unsupported by the record and unnecessary to revolving this matter.

and argue that the lower courts decided their case wrongly. Petitioners claim that review is appropriate because the Court of Appeals "rendered a decision sanctioning a lower court order which has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision." (Petition, p. 13). In reality, though, petitioners' argument amounts to nothing more than an assertion that the lower courts erred in characterizing and analyzing their claims. On certiorari, the Court reviews cases of significance; it does not sit simply to reconsider legal rulings by lower courts, even arguably erroneous ones.

2. In any event, the District Court correctly concluded that under DeShaney v. Winnebago County Department of Social Services, No. 87-154 (U.S. Feb. 22, 1989), petitioners' participation in the FWPP does not infringe on their liberty rights secured by the constitution.

According to DeShaney, the Due Process Clause only restricts state action; it does not obligate the state to protect an individual against private violence. Id. at 5-7. No special relationship is created that obligates the state to protect or care for an individual merely because the state knows of the individual's plight and has declared its desire to help him or her.

Id. at 7-10. Rather, the Constitution imposes an affirmative duty upon the state to care for the safety and general well-being of an individual only when the state takes the individual into its custody and holds him or her there against his or her will. Id. at 10. Thus, the critical question here is whether the government, specifically the respondents, have taken the Hertzkes into custody and hold them against their will.

The Hertzkes' participation in the FWPP does not amount to custody because, unlike the imprisoned and the institutionalized, they are not under the daily control of the government nor are they wholly dependent upon the

government for their survival. Even if the Hertzkes are in the government's custody, they are not being held in the FWPP "against their will." Ms. Hertzke voluntarily participated in the investigation. Likewise, she and her family voluntarily entered the FWPP. Their continued participation in the program is entirely voluntary. They have entered and reentered the program four times. Although the Hertzkes claim that their freedom to leave the program is illusory because their lives are allegedly in danger, the Due Process Clause does not guarantee the Hertzkes' protection against harm from third persons. Id. at 7-10. Therefore, the Hertzkes' due process liberty rights have not been violated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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